

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



March 25, 2002

Mr. James A. Erck
Erck & Wright, L.L.P.
P.O. Drawer 4040
Alice, Texas 78333

OR2002-1455

Dear Mr. Erck:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 160390.

The Alice Independent School District (the "district"), which you represent, received a request for all evaluations performed by school board members on superintendent Henry Herrera on or about January 15, 2002. You make no arguments to this office against disclosure of the requested information, but have submitted a copy of a legal opinion written by you and addressed to the district opining that the requested information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. You ask for our opinion concerning your interpretation of the law and as to whether Open Records Decision No 643 (1996), which construed section 21.355 of the Education Code, can be relied upon by the district as a previous determination to withhold the requested information. We have considered your comments and reviewed the submitted information.

In Open Records Decision No. 673 (2001), we set forth the circumstances under which, pursuant to section 552.301(a) of the Government Code, a governmental body could rely on a ruling from this office as a previous determination. ORD 673 clarified the two types of previous determinations. The first type of previous determination exists where – so long as the facts, circumstances, and law on which a ruling was based have not changed – requested information is precisely the same information as was addressed in a prior attorney general ruling, the ruling was addressed to the same governmental body, and the ruling concluded that the information is or is not excepted from disclosure. The second type is an attorney general decision that explicitly grants a governmental body or class of governmental bodies

a previous determination that – if certain conditions are met – may be relied upon to withhold information in response to subsequent requests without seeking an attorney general's ruling.

In this case, we do not have the precise information before us that was ruled upon in ORD 643, and therefore, the first type of previous determination is inapplicable in this instance. The second type of previous determination requires that all of the following criteria be met:

1. the requested records or information at issue fall within a specific, clearly delineated category of information about which this office has previously rendered a decision;
2. the previous decision is applicable to the particular governmental body or type of governmental body from which the information is requested;
3. the previous decision concludes that the specific, clearly delineated category of information is or is not excepted from disclosure under the Act;
4. the elements of law, fact, and circumstances are met to support the previous decision's conclusion that the requested records or information at issue is or is not excepted from required disclosure; and
5. the previous decision explicitly provides that the governmental body or bodies to which the decision applies may withhold the information without the necessity of again seeking a decision from this office.

Open Records Decision No. 673 at 7-8 (2001). As ORD 643 did not explicitly provide that the governmental body or bodies to which the decision applies may withhold the information without the necessity of again seeking a decision from this office, we conclude that the fifth criterion for a previous determination of the second type was not met in ORD 643. Therefore, as ORD 643 does not constitute a previous determination of either the first or second type as set forth in ORD 673, the district may not rely on ORD 643 as a previous determination to withhold the evaluations that were requested in this case.

Pursuant to section 552.301(e) of the Government Code, therefore, the district was required to submit to this office within fifteen business days of receiving the open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You did not, however, submit to this office a copy of the requested information.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Compelling reasons exist when the information is made confidential by law or affects the interest of a third party. Open Records Decision No. 630 at 3 (1994). In this instance, you indicate that the requested information is confidential under section 21.355 of the Education Code, and is therefore excepted from disclosure under section 552.101. The application of section 552.101 presents a compelling reason to overcome the presumption of openness. However, because you have not submitted the requested information, we are unable to determine whether it constitutes an evaluation that is confidential under section 21.355 of the Education Code, and thus is excepted from disclosure under section 552.101 of the Government Code. Thus, we have no choice but to order the information released per section 552.302. If you believe the information is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below. We caution that the distribution of confidential information constitutes a criminal offense. Gov't Code § 552.352.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one

of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 160390

c: Ms. Aubrey Morgan
Alice Newspapers, Inc.
405 East Main
Alice, Texas 78332

BOARD OF TRUSTEES OF THE ALICE
INDEPENDENT SCHOOL DISTRICT,

Plaintiff,

V.

HON. JOHN CORNYN, ATTORNEY
GENERAL OF THE STATE OF TEXAS,

Defendant.

§ IN THE DISTRICT COURT OF

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TRAVIS COUNTY, TEXAS

200TH JUDICIAL DISTRICT

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for entry of an agreed final judgment. Plaintiff Board of Trustees of the Alice Independent School District (the District) and Defendant John Cornyn, the Attorney General of Texas, appeared, by and through their respective attorneys, and announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552. In compliance with the Tex. Gov't Code § 552.325(c), the requestor, Aubrey Morgan, was sent reasonable notice of this setting and of the parties' agreement that Plaintiff may withhold some of the information at issue. The requestor was also informed of her right to intervene in the suit to contest the withholding of this information. The requestor has not informed the parties of her intention to intervene; neither has she filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. Some of the information at issue, specifically, the documents with Bates Stamped

03 MAR 24 PM 7:43

Mrs. [Signature]

CLERK OF COURT
TRAVIS COUNTY, TEXAS

EXHIBIT A

Nos. 6-8, 14-16, 22-24, 30-35, 37-39, and 41-44, is confidential by Tex. Educ. Code § 21.355, and, therefore, is excepted from disclosure under the PLA, Tex. Gov't Code § 552.101.


2. The District must withhold from the requestor the information enumerated in paragraph 1 of this Judgment.


3. The remaining information at issue not enumerated in paragraph 1 of this Judgment is not excepted from disclosure under the PLA, and the District shall release it to the requestor, no later than the fifth day after receipt by the District of this Agreed Final Judgment signed by the Court.

4. All costs of court are taxed against the parties incurring the same;

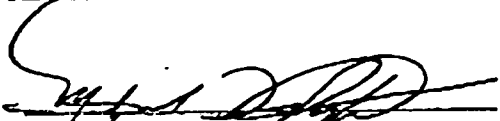
5. All relief not expressly granted is denied; and


6. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendant and is a final judgment.

SIGNED this the 27th day of March, 200~~2~~³ 


PRESIDING JUDGE

APPROVED:


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